File Date:
Oct 8 2008

2

No. 08-31

In the Supreme Court of the United States

NUFARM AMERICA'S INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
JEANNE E. DAVIDSON
TODD M. HUGHES
BARBARA S. WILLIAMS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Although import duties are generally imposed on goods imported into the United States, those duties can be refunded, or their payment can be deferred and ultimately waived, if the goods are used to manufacture articles that are then exported to another country that will apply its own import duties. Pursuant to a statute and regulation that implement a provision of the North American Free Trade Agreement (NAFTA), goods that are imported into the United States and used to manufacture articles that are exported to other NAFTA countries are eligible for a refund or waiver of import duties only to the extent the exported manufactured goods are subjected to import duties by the other NAFTA party. The question presented is as follows:

Whether the failure to waive import duties on goods brought into the United States and processed here before the manufactured item is exported duty-free to Canada violates the Export Clause, U.S. Const. Art. I, § 9, Cl. 5.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

A.G. Spalding & Bros. v. *Edwards*, 262 U.S. 66 (1923) 7, 8, 9, 10
Cornell v. *Coyne*, 192 U.S. 418 (1904) 7, 8, 10
Merck v. *United States*, 435 F. Supp. 2d 1253 (Ct. Int'l Trade 2006), aff'd, 499 F.3d 1348 (Fed. Cir. 2007) 11
Turpin v. *Burgess*, 117 U.S. 504 (1886) 7

Constitution, treaty, statutes and regulations:

U.S. Const. Art. I, § 9, Cl. 5 (Export Clause) 5, 7, 8, 12
North American Free Trade Agreement, *done* Dec. 17, 1992, 32 I.L.M. 289 2
Art. 302, 32 I.L.M. 300 2
Art. 303(1)(a), 32 I.L.M. 300 3
Art. 303(3), 32 I.L.M. 300 3
Harmonized Tariff Schedule of the United States:
General note 1 1
Ch. 29:
Subch. XVIII:
Subheading 2918.90.20 ..... 4, 5, 6, 7

Treaty, statute and regulations—Continued: Page

Ch. 98:
Subch. XIII:
U.S. note 1(a) 4
U.S. note 1(c) 3, 6
Subheading 9813.00.05 ..... 4, 6
19 U.S.C. 1311 ..... 2, 3
19 U.S.C. 1313(a) 2
19 U.S.C. 1313(n) 3
19 C.F.R.:
Section 19.15(f) 2
Section 19.15(g)(1) 2
Section 19.15(*l*) 2
Section 181.44(a) 4
Section 181.53 ..... 5, 6
Section 181.53(b)(2) 4, 7
Section 181.53(b)(5) 4, 7
Section 191.21 2

Miscellaneous:

H.R. Rep. No. 361, 103d Cong., 1st Sess. Pt. 1 (1993) 2

In the Supreme Court of the United States

No. 08-31

NUFARM AMERICA'S INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 521 F.3d 1366. The opinion of the Court of International Trade (Pet. App. 14a-36a) is reported at 477 F. Supp. 2d 1290.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2008. The petition for a writ of certiorari was filed on July 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. All goods imported into the United States are subject to import duties unless specifically exempted. See Harmonized Tariff Schedule of the United States (HTSUS), General note 1. If the imported merchandise

is used to manufacture articles that are then exported, the import duties are, in certain circumstances, eligible to be refunded to the importer. Such a refund is referred to as a "drawback." 19 U.S.C. 1313(a); 19 C.F.R. 191.21. Without a drawback, the good would be subjected to import duties twice—first by the United States on the raw materials, and again on the manufactured good by the country to which the article is exported. Congress has also established an alternative procedure under which, rather than paying the import duty and seeking a drawback, the importer can temporarily bring the goods into the United States under bond, use the goods to manufacture a further article, and export the article, in which case import duties on the imported raw materials are waived. 19 U.S.C. 1311; 19 C.F.R. 19.15(f), (g)(1), and (*l*); HTSUS Subheading 9813.00.05.

In the North American Free Trade Agreement (NAFTA), *done* Dec. 17, 1992, 32 I.L.M. 289, the United States, Canada, and Mexico agreed to eliminate or reduce tariffs on goods traded between NAFTA countries. Art. 302, at 300. In light of the elimination of import duties between the countries, the parties to NAFTA sought to ensure "that none of the NAFTA countries * * * become an 'export platform' for materials produced in other regions of the world," H.R. Rep. No. 361, 103d Cong., 1st Sess. Pt. 1, at 40 (1993), *i.e.*, that importers not be able to circumvent the payment of *any* import duties by importing goods into one NAFTA country and then obtaining a drawback or waiver of that country's duty upon transferring the good to another NAFTA country duty-free. Thus, in Article 303 of NAFTA, each party agreed that it would not "refund the amount of customs duties paid, or waive or reduce the amount of customs duties owed, on a good imported into its terri-

tory, on condition that the good is * * * subsequently exported to the territory of another [NAFTA] Party," except that drawback or waiver of such duty would be permitted up to "the total amount of customs duties paid to another Party on the good that has been subsequently exported to the territory of that other Party." Art. 303(1)(a), 32 I.L.M. at 300. The parties further agreed that, where a good has been imported into one NAFTA country subject to a duty deferral program "and is subsequently exported to the territory of another Party; or is used as a material in the production of another good that is subsequently exported to the territory of another Party * * * the Party from whose territory the good is exported * * * shall assess the customs duties as if the exported good had been withdrawn for domestic consumption," except to the extent that the country to which the manufactured good is exported imposes its own import duty on that article. Art. 303(3), at 300.

Congress implemented Article 303 by providing that neither drawback nor waiver of import duties is available for imported goods that are used to manufacture articles for export to Canada or Mexico, except to the extent that the goods are subject to import duty by the other NAFTA party. 19 U.S.C. 1311, 1313(n); HTSUS Ch. 98, Subch. XIII, U.S. note 1(c). Those statutory mandates have, in turn, been implemented in Customs and Border Protection (CBP) regulations. With respect to drawbacks, "drawback of the duties previously paid upon importation of a good into the United States may be granted" up to the "total amount of duties paid on the exported good upon subsequent importation into Canada or Mexico," but the drawback may not exceed the amount of the import duties paid to the United States. 19 C.F.R. 181.44(a).

With regard to duty-deferral, HTSUS Subheading 9813.00.05 provides that "[a]rticles to be repaired, altered or processed" may be entered under bond, without payment of the import duty, subject to their exportation. HTSUS Ch. 98, Subch. XIII, U.S. note 1(a) and Subheading 9813.00.05. When an "article imported into the United States, for processing, under heading 9813.00.05" is exported to another NAFTA party, the import duty is "waived or reduced" up to "the total amount of customs duties paid to Canada or to Mexico on the exported article." *Id.* U.S. note 1(c). CBP's regulations make clear that the duty that is owed, subject to potential waiver up to the amount of "customs duties paid to Canada or Mexico," is the duty "assessed on the good on the basis of its condition at the time of its importation into the United States." 19 C.F.R. 181.53(b)(5). See also 19 C.F.R. 181.53(b)(2) (duty is "assessed on the materials in their condition and quantity, and at their weight, at the time of their importation into the United States").

2. Petitioner imported into the United States from Australia and the Netherlands certain chemicals that were subject to duty pursuant to HTSUS Subheading 2918.90.20. Pet. App. 2a, 16a-17a. Instead of paying those duties immediately, petitioner invoked HTSUS Subheading 9813.00.05 to defer payment. *Id.* at 17a. Petitioner processed the imported chemicals in the United States to produce an herbicide, which petitioner then exported to Canada. *Id.* at 3a, 17a.

The new product entered Canada duty-free. Pet. App. 17a n.4. After the manufactured product was exported to Canada, Customs liquidated import duties on petitioner's chemical entries pursuant to HTSUS Subheading 2918.90.20. Pet. App. 17a. Because Canada assessed no import duties on the herbicide, petitioner

was ineligible for a waiver or reduction of the import duties the United States had imposed on the chemical raw materials. *Id.* at 17a & n.4.

Petitioner filed protests against the liquidations. Petitioner alleged, *inter alia*, that the requirement to pay deferred import duties on raw materials at the time the finished product is exported violates the Export Clause of the Constitution, Art. I, § 9, Cl. 5, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." Pet. App. 3a. CBP denied the protests. *Ibid.*

3. Petitioner commenced this action in the United States Court of International Trade, alleging that 19 C.F.R. 181.53 violates the Export Clause by imposing a tax on exported goods. Pet. App. 15a. The court granted summary judgment in the government's favor. *Id.* at 14a-33a. The court held that references in Section 181.53 to the assessment of duties at the time of export to another NAFTA country do not establish a violation of the Export Clause because Section 181.53 relates only to the manner in which import duties imposed under HTSUS General Note 1 at the time of importation are to be calculated when their payment has been deferred. *Id.* at 24a-27a. The court likewise held that the timing of payment established in Section 181.53, which specifies that deferred import duties are payable within a specified time after export to the extent they are not waived, does not transform those import duties into a tax laid on exported articles. *Id.* at 30a-31a.

4. The court of appeals affirmed. Pet. App. 1a-11a. The court held that Section 181.53's references to payment of duties after export did not make the regulation unconstitutional on its face because "the entire regulation, read in context, refers to a duty on imports de-

ferred until the time of export." *Id.* at 8a. The court observed that the duty is collected on the "article imported into the United States." *Id.* at 9a (quoting HTSUS Ch. 98, Subch. XIII, U.S. note 1(c)). The court also rejected petitioner's "as applied" argument based on the timing of the duty assessment. *Id.* at 9a-10a. The court explained that the deferred duty assessment merely helps "to ensure proper calculation of duty rates" in light of the fact that the importer may be entitled to a waiver or reduction of the import duties if it subsequently exports the manufactured good. *Id.* at 9a.

ARGUMENT

Petitioner challenges the court of appeals' holding that 19 C.F.R. 181.53, which imposes a duty upon imported goods but permits the importer to defer payment of those duties until a potential waiver or reduction can be calculated, does not violate the Export Clause. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner does not challenge the court of appeals' holding that the duty petitioner was required to pay was an "import tax." Pet. 13. The court's conclusion was plainly correct. The chemicals imported by petitioner were subject to duty upon importation, calculated pursuant to HTSUS Subheading 2918.90.20. Pet. App. 2a, 16a-17a. Instead of paying those duties immediately, petitioner chose to utilize HTSUS Subheading 9813.00.05 to defer payment. Pet. App. 17a. When it came time to calculate and assess the duty, CBP did so based upon the value and condition of petitioner's imported chemicals at the time they entered the United

States, pursuant to HTSUS Subheading 2918.90.20. Pet. App. 17a. That duty did not in any way depend upon the weight or value or any other characteristic of the herbicide that petitioner produced from the chemicals after they were imported into this country. See 19 C.F.R. 181.53(b)(5) ("duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States"); 19 C.F.R. 181.53(b)(2) ("duty shall be assessed on the materials in their condition and quantity, and at their weight, at the time of their importation into the United States").

The court of appeals correctly held that imposition of an import tax on petitioner's imported chemicals does not violate the Export Clause. As this Court has made clear, general taxes and duties imposed prior to exportation on goods intended for export are constitutional. See *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904); *Turpin* v. *Burgess*, 117 U.S. 504 (1886). The Export Clause's command that no "tax or duty can be cast upon the exportation of articles, * * * does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." *Cornell*, 192 U.S. at 427. Nor does it matter that the import duties in this case were imposed upon goods that, at the time of their importation, petitioner intended to use to manufacture an article that would then be exported. As the Court explained in *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923) (*Spalding*), even "while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants." *Id.* at 69. See also *Cornell*, 192 U.S. at 427 ("Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese

is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export.").

Nor does it matter that Congress allowed petitioner, at its option, to defer payment of the import duties until such time as it could be determined whether and to what extent the import duties might be waived. Petitioner does not and could not plausibly argue that its intent to use imported chemicals as raw materials to produce another article for export precludes the government from imposing and assessing import duties on those chemicals at the time of importation. See *Spalding*, 262 U.S. at 69; *Cornell*, 192 U.S. at 427. Nor does petitioner argue that it violates the Export Clause for Congress to grant drawback of import duties upon the export of articles made from imported goods.

The Export Clause prohibits the laying of taxes on exports; it does not prohibit Congress from refunding import duties in order to facilitate international trade. Thus, petitioner's argument boils down to a contention that it violates the Constitution for Congress to adopt a system that allows importers, for their convenience and at their option, to defer payment of a legal import duty until it can be determined whether the importer might be entitled, upon later export, to a partial or complete waiver of the import duty. Nothing in this Court's cases construing the Export Clause supports such a rule.

2. Although petitioner does not challenge the court of appeals' determination that the duties at issue here were "import duties," petitioner contends that the court erred by failing to consider whether assessment of those import duties violated the Export Clause under one of four different tests that petitioner contends the Court has adopted. Pet. 13, 23. Even under the alternative

tests offered by petitioner, the duties at issue here do not violate the Export Clause.

a. Petitioner contends (Pet. 15-18) that collection of import duties on petitioner's chemicals was forbidden because those chemicals were "in the 'export process' immediately upon importation until their required export." Pet. 16. That is so, petitioner maintains, because they "were 'intended for export' by virtue of their entry into a duty deferral program and manufactured 'with specific reference to foreign wants.'" Pet. 17 (quoting *Spalding*, 262 U.S. at 69). Petitioner's reliance on *Spalding* is misplaced. The Court in that case recognized and applied its prior holding in *Cornell* that "while the goods were in process of manufacture they *were none the less subject to taxation*" even though they were "intended for export and made with specific reference to foreign wants." 262 U.S. at 69 (emphasis added). *Spalding* defined the "export process" as starting with "[t]he overt act of delivering the goods to the carrier." *Id.* at 70.

In this case, the exported good—the pesticide—did not even exist at the time the import duties were imposed on the imported chemicals. Under *Cornell* and *Spalding*, it would have been entirely permissible to impose a tax upon the manufacturing of petitioner's pesticide, even if that end product were intended for exportation. Because petitioner's pesticide was placed in transit for export only after it was processed in the United States, the duties imposed on the raw material chemicals at the earlier stage of importation were not imposed on goods in the "export process."

b. Petitioner argues (Pet. 18-19) that the import duties were "functionally 'laid'" upon petitioner's exported goods because the applicability of the duties de-

pends under the regulation on the circumstances under which the goods are ultimately exported—and, in particular, on whether the goods are exported to Canada or Mexico rather than to some other country. Contrary to petitioner's contention, the import duties related entirely to petitioner's importation of chemicals. The duties were calculated based on the nature and character of the goods imported at the time of import and according to the tariff rate applicable to the imported goods, without reference to the nature or value of the manufactured product that was subsequently exported.

The fact and circumstances of export were relevant only to the extent that petitioner might have received a *waiver or reduction* of the import duties if it had exported the finished product to a country that charged an import duty. In the event, petitioner was not entitled to any reduction because its exported goods were not subjected to import duties by Canada. But a failure to waive import duties based on the fact and circumstances of subsequent export is no more the functional equivalent of an export duty than is the failure to waive a manufacturing tax because of ultimate export. This Court's decisions make clear that there is no requirement to refund a manufacturing tax simply because the manufactured good is later exported. See *Spalding*, 262 U.S. at 69; *Cornell*, 192 U.S. at 427.

Nothing in this Court's decisions suggests that the current statutory and regulatory regime violates the Export Clause simply because an importer's obligation to pay import duties depends under some circumstances on the country to which the goods are subsequently exported. The drawback and waiver mechanisms serve to prevent the double taxation that would otherwise be imposed if particular goods were subjected to import

duties both by the United States and by the country to which those goods are subsequently exported. See p. 2, *supra*. Congress's decision to make drawback and waiver available in circumstances where double taxation would otherwise occur did not compel it to provide like relief where (as here) that concern is absent.

c. Petitioner maintains (Pet. 19-21) that the duty-deferral program violates the Export Clause because it "regulate[s] international commerce through export taxes or their functional equivalent." As explained above, see pp. 6-8, 10-11 *supra*, the import duties at issue here are neither "export taxes" nor their "functional equivalent." Petitioner's contention that NAFTA has the "functional effect of burdening the exports to Canada or Mexico" is wholly without merit. NAFTA *frees* trade between the United States, Canada, and Mexico by eliminating import duties on trade between them.

In light of that fact, import-duty drawback programs and similar duty-deferral programs would be inappropriate. Their application to NAFTA exports would allow companies importing goods into NAFTA countries to avoid import duties altogether by the simple expedient of first shipping the goods into one NAFTA country for processing and then exporting the manufactured item to another NAFTA country. See *Merck* v. *United States*, 435 F. Supp. 2d 1253, 1259-1260 (Ct. Int'l Trade 2006), aff'd, 499 F.3d 1348 (Fed. Cir. 2007). Because, in light of NAFTA, petitioner's exported herbicide was not subject to import duties imposed by Canada, petitioner's imports were not "similarly situated," *Cornell*, 192 U.S. at 427, to imports used to manufacture goods for export to countries with which the United States does not have a similar trade agreement. The Export Clause does not require the United States to waive import duties on raw

materials used to manufacture goods for export that will pass duty-free into other NAFTA countries.

d. Petitioner urges (Pet. 22-23) that collection of import duties on its imported chemicals constitutes an impermissible tax on "services and activities closely related to the export process." The "service" that petitioner claims is being burdened is its "use of a duty deferral program." Pet. 23. The duty deferral program, as its name suggests, is a program that allows the payment of duties to be "deferr[ed]" and assessed later when it can be determined whether and to what extent those duties are subject to reduction or waiver. The ultimate assessment and collection of the deferred duty cannot plausibly be described as imposing "effectively a tax" on petitioner's use of that "service." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
JEANNE E. DAVIDSON
TODD M. HUGHES
BARBARA S. WILLIAMS
Attorneys

OCTOBER 2008